

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application) DOCKET NO. 2009-0049
)
 of)
)
 WAI'OLA O MOLOKA'I, INC.)
)
 For review and approval of rate)
 increases; revised rate schedules;)
 and revised rules.)
 _____)

PUBLIC UTILITIES
COMMISSION

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FILED

**COUNTY OF MAUI'S RESPONSE TO DIVISION OF CONSUMER
ADVOCACY'S AND WAI'OLA O MOLOKA'I, INC.'S JOINT UPDATED
STATEMENT OF PROBABLE ENTITLEMENT**

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STATEMENT OF PROBABLE ENTITLEMENT**

COUNTY OF MAUI, by and through its attorneys, BRIAN T. MOTO, Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and BRONSTER HOSHIBATA, submits its response to the Division of Consumer Advocacy's and Wai'ola O Molokai, Inc.'s Joint Updated Statement of Probable Entitlement, filed May 21, 2010, as follows:

I. INTRODUCTION

Seventeen years after filing its Application for a Certificate of Public Convenience and Necessity,¹ Wai'ola O Moloka'i, Inc. ("WOM") filed an application for a rate increase seeking to permanently raise its water utility rates from \$1.85 (per 1,000 gallons)² to a shocking \$8.9675 (per 1,000

¹ County Hearing Exhibit No. 2.

² See County Hearing Exhibit 3: Water Rate Schedule approved by the Commission in its Decision and Order No. 12125, filed January 13, 1993 in Docket No. 7122.

gallons).³ Although the Commission established *temporary* rates at \$5.15 (per 1,000 gallons) in 2008 to avoid a shut-down in water utility service,⁴ the rate shock felt by WOM's customers⁵ if the water rates are raised any further⁶ cannot be emphasized enough and should not be ignored by the Commission.

On May 19 and May 20, 2010, the Commission held a contested case hearing in which questions were raised by the County as to the reliability of WOM's record evidence and the settlement agreement reached between the Consumer Advocate ("CA") and WOM. Based on the incomplete record and unreliable evidence submitted by WOM in this proceeding, the Commission has the authority to reject the figures offered by WOM and the CA, and instead adopt the County's analysis which is supported by the record evidence. As set forth in more detail below, the Commission should reduce WOM's revenue and expenses that would allow for a utility rate far less than the rate agreed to by

³ WOM 5 attached to WOM's Amended Application filed June 29, 2009.

⁴ WOM 4 attached to WOM's Amended Application filed June 29, 2009. The temporary rates were established by the Commission in Docket No. 2008-0115 based on WOM's threats to shut down water utility service effective August 31, 2008. The Commission's temporary rates were based on unaudited financial statements submitted by WOM to establish its temporary rates.

⁵ WOM's customers are among the most impoverished in the State.

⁶ Just prior to the start of the evidentiary hearing on May 19, 2010, the Consumer Advocate ("CA") and WOM entered into a settlement agreement in which WOM and the CA agreed to raise WOM's rates to \$7.9541 (per 1,000 gallons). See WOM Hearing Exhibit No. 1, attached at page 3 of 7, line 12, column 9.

the CA and WOM.

II. INTERIM RATE RELIEF STANDARD

HRS § 269-16(d) requires the Public Utilities Commission to make every effort to complete its deliberations with respect to a public utility's request for a rate increase "as expeditiously as possible and before nine months from the date the public utility filed its completed application[.]" The statute further provides that if the Commission does not conclude its deliberations within the nine-month period, the Commission must render an "interim decision" within one month after the expiration of the nine-month period. *Id.*

The interim decision may only allow an increase if the Commission believes the public utility is "probably entitled" to such interim relief. *Id.* The Commission may postpone its interim rate decision by thirty days if the Commission considers the evidentiary hearings incomplete. *Id.*

According to the Commission, in deciding interim rate relief, "the Commission's scrutiny of both the record and the discourse during the evidentiary hearings is . . . necessarily quick, unlike the careful deliberation the Commission consistently accords issues in rendering final decisions." *In re Hawaiian Elec., Co., Inc.*, Docket No. 04-0113, Interim Decision and Order No. 22050, filed on September 27, 2005, at 5 - 6, n. 7 (quoting *In re Hawaiian Elec. Co., Inc.*, Docket No. 6998, Interim Decision and Order No. 11559, filed March 31, 1992, at 7). Further, this Commission has acknowledged that it

“postpones determinations of reasonableness with respect to certain unresolved matters” because otherwise, “the speed with which [the public utility] is given interim rate relief would be affected.” *Id.*

The County understands that this interim rate relief “standard” may apply generally in a typical rate case. Nevertheless, given that WOM waited seventeen years between rate applications, the Commission should not postpone any reasonableness determination and should not be overly concerned with a speedy determination for WOM at the expense of WOM’s customers. Instead, the Commission should carefully review and scrutinize the submissions by WOM, including the settlement agreement WOM reached with the CA, even in determining interim rate relief.

III. ARGUMENT

During the course of the evidentiary hearing, it became abundantly clear that serious questions remain unanswered as to the legitimacy of WOM’s operating expenses and the settlement figures reached with the CA. A number of significant reductions should be made to WOM’s expenses by this Commission, including reductions to Insurance, Regulatory Expenses, Cost of Sales, and Depreciation, which will reduce WOM’s revenue requirements and will result in a lower interim rate.

A. Insurance

The agreed upon Insurance expense of \$16,000 is not supported by the record evidence. Rather, WOM’s own evidence shows that WOM’s insurance is

\$7,792. See Attachment CA-IR-47, WOM 10.10, filed December 3, 2009.

Thus, the Insurance expense of \$16,000⁷ should be reduced by \$8,208 for a total of \$7,792.

B. Regulatory Expenses Should Be Reduced Because They Do Not Comply with Hawaii Law.

In *Hawaii Ventures, LLC v. Otaka, Inc.*, 116 Hawai'i 465, 475-76 n.8 (2008), the Hawaii Supreme Court significantly reduced a receiver's fees and the receiver's attorneys' fees because a reasonableness determination could not be made by the Court because the receiver and the attorneys "block billed."⁸

Likewise, this Commission should significantly reduce the regulatory fees in this case because the fees submitted suffer from the same fatal flaw in the *Otaka* case. WOM's attorneys and WOM's testifying expert, Robert O'Brien, submitted bills⁹ which simply lump together tasks making it impossible for this

⁷ Line item 17 of WOM Hearing Exhibit No. 1.

⁸ Block billing is the lumping together of two or more tasks into a single entry, such as "phone call with client, prepare for hearing, travel to court, appear at hearing on motion to compel, research re attorneys' fees, total 8 hours" where it is not possible to determine how much time was spent on each discrete task.

⁹ During the proceedings, the County asked the Commission to take official notice of the legal bills submitted by the Morihara Lau & Fong law firm, WOM's counsel, which were submitted by WOM on a monthly basis in Docket No. 2008-0115. The bills were marked as "confidential" and thus, were not entered as an exhibit in this proceeding. Mr. O'Brien's bills are not confidential and are set forth in Attachment CA-RIR-6b, filed March 1, 2010 with WOM's Supplemental Response to the CA's Submission of Rebuttal Information Requests (CA-RIR-6b).

Commission to determine whether the time spent by the attorneys and Mr. O'Brien was reasonable.

Moreover, WOM seeks to recover nearly \$300,000 in regulatory expenses which includes attorneys' fees and fees for Mr. O'Brien even though WOM's annual revenue is well below a half million dollars. WOM and its testifying expert, Mr. O'Brien, tried to blame the County for the excessive fees they charged, however, the record evidence shows that WOM did not respond to the County's Information Requests in any meaningful way.¹⁰ Mr. O'Brien's bills do not even differentiate the time he spent responding to the CA's IR's as opposed to the County's IR's which is contrary to his cross-examination testimony in which he swore under oath that he did differentiate between the County's and the CA's IR's.¹¹ See Attachment CA-RIR-6b filed March 10, 2010.

Since WOM's attorneys and their testifying expert failed to follow Hawaii law and justify their fees in a non-block billed format, the Commission should reduce the regulatory expenses by one-third from \$225,000 to \$150,000 and amortize the expense over a period of five years. This decrease is reasonable,

¹⁰ See WOM's Responses to County of Maui's Information Requests and Supplemental Information Requests, filed November 25, 2009 and December 23, 2009, respectively.

¹¹ Mr. O'Brien's testimony to the effect that the County's intervention is to blame for the costs associated with WOM's expert's and attorneys' preparation for the evidentiary hearing is not also not credible, given that WOM and the Consumer Advocate did not reach a settlement until after the start of the evidentiary hearing on May 19, 2010.

appropriate, consistent with Hawaii law, and has been done by courts in other jurisdictions when attorneys block bill. *See, e.g., Welch v. Metropolitan Life Insurance Company*, 480 F.3d 942, 948 (9th Cir. 2007) [District Court's 20 per cent reduction for block billing was reasonable "because block billing makes it more difficult to determine how much time was spent on particular activities"]; *Berry v. Hawaii Express Service*, 2007 WL 689474 at *17 (D. Hawai'i 2007) [25% reduction imposed by court for block billing]; cf. *Synagro Technologies, Inc. v. GMP Hawaii, Inc.*, 2007 WL 851271 *13 (D. Hawai'i 2007) [fee request reduced by 5% due to block billing].

C. Cost of Sales

The CA and WOM agreed to \$114,389 for WOM's cost of sales expense¹² which is based on a figure inserted from the settlement agreement reached between the CA and Molokai Public Utilities, Inc. ("MPU") in MPU's rate application case, Docket No. 2009-0048.¹³ During the hearing, WOM's testifying expert, Mr. O'Brien, admitted that there was no documentation in the record in either MPU's rate case or WOM's rate case that the Commission could refer to in order to justify the cost of sales figure. At this late stage, WOM requested to submit workpapers to justify the figures. The County objected to

¹² Line item 10 on page 1 of WOM's Hearing Exhibit No. 1.

¹³ *See* May 11, 2010 letter from MPU to the Commission with attachments detailing the settlement agreement reached between the CA and MPU.

WOM's request and believes permitting the utility company to submit evidence post-hearing would be erroneous and constitute clear error under HRS, chapter 91.

Therefore, the Commission should reduce the cost of sales from \$114,389 to \$95,680, an amount WOM acknowledged and admitted is reasonable. See WOM Hearing Exhibit No. 1, line 10, column 4.

D. Depreciation

The largest questionable expense is the depreciation amount of \$107,940 which the Commission can and should reject in its entirety because the expense is not supported by the record evidence. This expense amounts to twenty-three percent (23%) of WOM's total revenue requirement. If the Commission adopts the settlement figures agreed to by the CA and WOM, which includes this unsupported depreciation expense, nearly \$2.00 of the \$7.95 rate goes to depreciation. However, if the Commission rejects this expense in its entirety (which it should), WOM's revenue requirement, as well as the corresponding rate amount, will be significantly reduced.

The depreciation expense is not supported by the record for a number of reasons. First, after extensive cross-examination, Mr. O'Brien finally admitted under oath that he disagreed (i.e., rejected) the independent auditor's report which showed the depreciated assets as a lower amount than Mr. O'Brien. WOM has not submitted any credible or reliable evidence that justifies the

greater amount relied upon by Mr. O'Brien.

Second, serious questions remain as to whether the depreciated assets have been double counted, who actually owns the assets, and which entity affiliated with WOM (i.e, MPU, MPL, etc.) received a write-off for any of the assets. The depreciated dollar amounts and the descriptions of the assets are simply not clear in the record and WOM has offered no reasonable or reliable explanation to explain the plethora of inconsistencies that are littered throughout this record. See list of assets described on CA's Direct Testimony filed January 13, 2010, Exh. CA 107 and compare with County of Maui's Exhibit 2, and WOM's Response to CA-IR-14(c) and Attachment CA-IR-14c, filed November 25, 2009.

Third, Mr. O'Brien could not even confirm if all of the assets listed in CA 107 were still in service, and if they are "used and useful" exclusively for WOM customers. It is undisputed that the Maunaloa Reservoir is shared between MPU and WOM, yet, 100% of this asset is being paid for by WOM customers and MPU is not paying a single dime to WOM for its use. Further, Mr. O'Brien's testimony that one of the largest depreciated expenditures, the Maunaloa 12" water main which amounts to \$247,636,¹⁴ is actually being used and that his earlier responses to information requests were "incorrect," is just not credible. Mr. O'Brien earlier sponsored two very specific and detailed

¹⁴ CA 107 at line 10.

information requests about this water main, and he wrote that the water main “is not used for utility services at this time” and was “put on hold.” See WOM’s Responses to CA-SIR-16, filed December 23, 2009 and WOM’s Response to CA-IR-21, filed November 25, 2009, respectively. At the hearing, however, when it became clear that the County challenged the accuracy of the depreciation expenses, Mr. O’Brien then claimed that the day before, WOM learned of his “error.” This is simply not believable and the Commission should reject outright this testimony.

The Commission should not accept the depreciation figure that is being offered by WOM when so many questions remain and neither should the Commission adopt the CA’s approach, which simply rejected any depreciation expenses prior to 1991.¹⁵ Moreover, WOM’s blatant disregard for the law and

¹⁵ Unfortunately, the CA believes that by simply getting WOM to agree to a reduced revenue requirement, the CA has fulfilled his duties to “represent, protect and advance the interests of all consumers[.]” HRS § 269-51. The County respectfully disagrees and believes the CA avoided his statutory duties and responsibilities to the consumers. With all due respect to the CA and his accounting abilities, the CA should have done more to protect the consumers in WOM’s service area, many of whom are among the most impoverished in the State. The CA testified at the hearing that in protecting the interests of the consumers, he must balance the utility company’s need to meet its operating expenses and to continue to provide the utility service. The County disagrees that the role of the CA includes protecting the interests of the utility company. It is the Commission’s role to establish rates that are fair and just to both the consumers and the utility, which necessarily includes setting rates that meet the needs of the utility company to keep it operational. The CA’s responsibility is to advocate “the interests of the consumer of utility services” and by statute, the CA’s duty is “separate and distinct from the responsibilities of the public utilities commission.” HRS § 269-51.

regulations cannot be ignored. The original CPCN issued to WOM in 1993¹⁶ did not approve a tariff for Kualapuu. Despite not having Commission approval, WOM charged customers in Kualapuu even though they were operating without a CPCN. According to CA 107, most of WOM's recently incurred and largest improvement charges relate to Kualapuu. Why should WOM be rewarded and be allowed to pass off these expenditures to WOM customers when WOM has failed to follow the law and this Commission's orders? It would be within the Commission's authority to reject the depreciation expenses for Kualapuu given the illegalities on WOM's part.

E. Application of the Rebuttable Presumption

The County believes that the rebuttable presumption that was established by the Hawaii Supreme Court in *In re Puhi Sewer & Water Co., Inc.*, 83 Haw. 132 (1996) is applicable to this case and should be applied by the Commission. The County will further elaborate on the application of the presumption in its closing argument brief which will be filed fourteen days after WOM and the CA file their closing briefs.¹⁷

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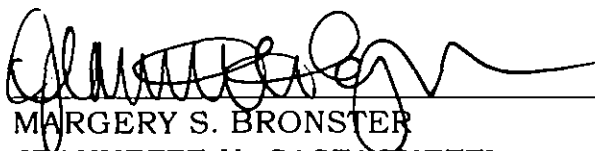
¹⁶ See County of Maui Hearing Exhibit No. 3.

¹⁷ See letter from the Commission dated May 20, 2010 establishing closing brief deadlines.

IV. CONCLUSION

The Commission should make the adjustments as outlined by the County of Maui which will have the affect of reducing WOM's revenue requirement resulting in a significantly lower rate for WOM customers. The CA and WOM agreed to a water usage rate of \$7.9541.¹⁸ However, if the County's position is adopted as set forth in this updated statement of probable entitlement, the rate for the consumers in WOM's service area will be reduced to \$5.4396.

DATED: Honolulu, Hawaii, May 25, 2010.



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¹⁸ See WOM Hearing Exhibit No. 1 at page 4 of 7, line 12, column 15.

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CERTIFICATE OF SERVICE

Pursuant to Hawaii Administrative Rules § 6-61-21(d), the undersigned certifies that a true and correct copy of the foregoing document was duly served on the following parties on May 25, 2010, at their last known addresses in the manner specified below:

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